HUP BEE SENG

v.

DR. NG TENG KOK & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 11-7-82]
14 APRIL 1987

CIVIL PROCEDURE: *Appeal by tenant from judgment of Magistrate giving possession of stall to respondents - Respondents owners of premises at time of expiry of notice to quit but not at date of hearing - Locus standi - Whether respondents entitled to possession, mesne profits and costs.*

This was an appeal by the tenant from the judgment of the learned Magistrate, George Town, giving possession of a stall No.96 comprised in premises 257 Penang Road to the respondents who were the owners thereof at the time of the expiry of the notice to quit and the issue of the summons but not at the date of the hearing for by then it had been transferred to an incorporated company in which they were shareholders.

Held:

[1] In an action for recovery of possession of immovable property the proper plaintiff is the person now entitled to immediate possession of the property. He may be either the registered proprietor or only a tenant. If there be no tenancy created by, or otherwise binding on the registered proprietor, then his ownership involves the right to present possession and where there is more than one owner all should be jointed as plaintiffs.

[2] The respondents not being the registered proprietors of the premises the subject of this action as at the date when judgment was pronounced were not entitled to immediate possession thereof; the right to sue was thus not legally vested in them at that moment but in the incorporated company concerned who ought to have been substituted as the proper plaintiff.

[3] The appeal was allowed, and the orders for possession and mesne profits set aside. No order was made with regards to costs as the error which gave rise to it was that of the learned Magistrate and not that of the respondents who had unsuccessfully attempted through their Counsel to cure the defect.

[Appeal allowed; no order as to costs.]

Cases referred to:

Performing Rights Society Ltd. v. London Theatre of Varieties Ltd. [1924] AC 1
Walter & Sullivan Ltd. v. J. Murphy & Sons Ld. [1955] 2 QB 584
Sivagami Achi v. P. Rm. Ramanathan Chettiar & Anor. [1959] MLJ 221
Public Trustee v. Elder [1926] Ch 776
Attorney-General v. Garner [1907] 2 KB 480
Mitchell v. Tarbutt [1794] TR 649
Lauri v. Renad [1892] 3 Ch 402
Howard v. Howard [1892] 30 LR Ir 340

Legislation referred to:

Subordinate Courts Rules 1980, O. 8 rr. 6(1), 7(2)

Other sources referred to:
Queen's Bench Forms, Chitty & Jacobs 19th Edn. p. 106

For the appellant - Yeap Ghim Guan; M/s. Yeap & Co.
For the respondents - Murad bin Abdul Aziz; M/s. Murad & Leong

JUDGMENT

Edgar Joseph Jr J:

This was a tenant's appeal from the judgment of the learned Magistrate, George Town, giving possession of a stall No. 96 comprised in premises 257, Penang Road popularly known as the Penang bazaar ("the premises") to the plaintiffs who were the owners thereof at the time of the expiry of the notice to quit and the issue of the summons but not at the date of the hearing for, by then, it had been transferred to an incorporated company in which they were shareholders. In these circumstances, at the hearing Counsel for the plaintiffs in the Court below made oral application to add the incorporated company as a co-plaintiff but the learned Magistrate "decided to proceed with the hearing with the original parties, in order to determine the rights and liabilities of the parties as at the time of the filing of the action." Accordingly, nothing more was said about the point, the trial proceeded ending in judgment for possession, mesne profits and costs being awarded to the plaintiffs.

When the appeal came on for hearing before me, I invited Counsel to address me on the preliminary point as to *locus standi,* although it was nowhere raised in the memorandum of appeal. At the conclusion of the arguments, from which I derived no assistance whatsoever, I reserved my judgment thereon.

It is true that in a Subordinate Court action now "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter" (SCR 1980 O. 8 r. 6(1)). Nevertheless, the rules do not alter the legal principles with regard to actions and it is still necessary to have before the Court the proper parties necessary for determining the point at issue: see for illustrative examples, *Performing Rights Society Ltd. v. London Theatre of Varieties Ltd.* [1924] AC 1; *Walter & Sullivan Ltd. v. J. Murphy & Sons Ld.* [1955] 2 QB 584; *Sivagami Achi v. P. Rm. Ramanathan Chettiar & Anor.* [1959] MLJ 221 *& Public Trustee v. Elder* [1926] Ch 776.

The application under O. 8 r. 6 of the SCR 1980, may be made "at any stage of the proceedings" which suggests that it can be made before judgment. (see *Attorney-General v. Garner* [1907] 2 KB 480).

In an action for recovery of possession of immovable property the proper plaintiff is the person now entitled to immediate possession of the property. He may be either the registered proprietor or only a tenant. If there be no tenancy created by, or otherwise binding on the registered proprietor, then his ownership involves the right to present possession and where there is more than one owner all should be joined as plaintiffs: *Mitchell v. Tarbutt* [1794] TR 649, 651 *& Lauri v. Renad* [1892] 3 Ch 402.

Accordingly, where as here, the action for possession of immovable property had been correctly commenced in the names of the registered proprietors but by the date of the hearing the interest in the subject matter has devolved upon some other person, the latter is entitled to apply that he be made a party to the action and the proceedings be carried on as if he

had been substituted for the original party: SCR 1980 O. 8 r. 7(2). It is the interest or liability already the subject matter of the action which is covered by the rule: see *Howard v. Howard* [1892] 30 LR Ir 340.

I should, perhaps, interpolate, by repeating that Counsel for the plaintiffs in the Court below had applied **orally** to add the incorporated company as a co-plaintiff. Procedurally, this was quite incorrect for the application should have been made by *ex parte* notice in form 165 supported by affidavit in a form such as that proposed in Chitty & Jacobs *Queen's Bench Forms* 19th Edn. p. 106. The affidavit must state (1) the nature of the claim in the action and the stage which the action has reached; (2) the circumstances in which the interest or liability of a person came to be assigned or transmitted; (3) the interest or liability of the party by and against whom it is proposed that the action should be continued; (4) if necessary that the cause of action survives or continues; and (5) the nature of the order asked for.

In the particular circumstances of this case, I am satisfied that the plaintiffs not being the registered proprietors of the premises the subject of this action as at the date when judgment was pronounced were not entitled to immediate possession thereof; the right to sue was thus not legally vested in them at that moment; it was vested in the incorporated company concerned who ought to have been substituted as the proper plaintiff.

The appeal is, therefore, allowed, the orders for possession and mesne profits set aside. As regards costs, as the ground upon which this appeal has been allowed was not raised by Counsel for the appellant and, as the error which gave rise to it, was that of the learned Magistrate and not that of the plaintiffs who had in fact unsuccessfully attempted through their Counsel to cure the defect, I propose to make no order as to costs.

Also found at [1987] 2 CLJ 167